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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95986; File No. SR-MEMX-2022-29]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule

October 5, 2022

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 30, 2022, MEMX LLC (“MEMX” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members³ (the “Fee Schedule”) pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on October 3, 2022. The text of the proposed rule change is provided in Exhibit 5.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to modify the required criteria under the Step-Up Additive Rebate.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading.⁴ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently

⁴ Market share percentage calculated as of September 29, 2022. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

represents approximately 3% of the overall market share.⁵ The Exchange in particular operates a “Maker-Taker” model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

The Exchange currently offers the Step-Up Additive Rebate under which the Exchange provides an additive rebate of \$0.0002 per share in addition to the otherwise applicable rebate for a qualifying Member’s executions of certain orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange (“Added Displayed Volume”).⁶ Currently, a Member qualifies for the Step-Up Additive Rebate by achieving one of the following two alternative criteria: (1) a Step-Up ADAV⁷ (excluding

⁵ Id.

⁶ The Step-Up Additive Rebate applies to all executions of Added Displayed Volume other than: (i) orders that establish the national best bid or offer (“NBBO”) if such Member qualifies for the Exchange’s NBBO Setter Tier; and (ii) Retail Orders. A “Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 11.21(a).

⁷ As set forth on the Fee Schedule, “ADAV” means the average daily added volume calculated as the number of shares added per day, which is calculated on a

Retail Orders) from April 2022 that is equal to or greater than 0.07% of the TCV;⁸ or (2) a Step-Up ADAV from July 2022 that is equal to or greater than 0.05% of the TCV and an ADAV that is equal to or greater than 0.30% of the TCV. The Exchange notes that the Step-Up Additive Rebate is designed to encourage Members that add liquidity on the Exchange to increase their liquidity-adding order flow, which benefits all Members by providing greater execution opportunities on the Exchange.

Now, the Exchange proposes to modify the required criteria such that a Member would now qualify for the Step-Up Additive Rebate by achieving one of the following two alternative criteria: (1) an ADAV that is equal to or greater than 0.45% of the TCV; or (2) a Step-Up ADAV from August 2022 that is equal to or greater than 0.10% of the TCV and an ADAV that is equal to or greater than 0.30% of the TCV. Thus, the proposed change would: (i) replace the first of the two alternative criteria (i.e., the April 2022 Step-Up ADAV threshold) with an overall ADAV threshold, and (ii) modify the second of such alternative criteria (i.e., the July 2022 Step-Up ADAV and overall ADAV thresholds) to increase the Step-Up ADAV threshold, reference a more recent baseline month for such threshold, and keep the overall ADAV threshold intact. As the proposed new alternative criteria are based on Step-Up ADAV and/or overall ADAV thresholds, such criteria are intended to encourage Members to maintain or increase their liquidity-adding order flow, thereby contributing to a deeper and more liquid market to the benefit of all Members. While the Exchange has no way of predicting with certainty how the

monthly basis, and “Step-Up ADAV” means ADAV in the relevant baseline month subtracted from current ADAV.

⁸ As set forth on the Fee Schedule, “TCV” means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

proposed new criteria will impact Member activity, the Exchange expects that more Members will strive to qualify for such tier than currently qualify, resulting in the submission of additional order flow to the Exchange. The Exchange is not proposing to change the rebate provided under the Step-Up Additive Rebate.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁹ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹¹

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

¹¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow, including liquidity-adding orders, to the Exchange, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that the Step-Up Additive Rebate, as modified by the proposed changes to the required criteria under such tier, is reasonable, equitable and not unfairly discriminatory for these same reasons, as such tier would continue to provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, is available to all

(June 29, 2005).

Members on an equal basis, and, as described above, is designed to encourage Members to maintain or increase their order flow, including liquidity-adding orders, to the Exchange in order to qualify for an additive rebate for certain executions of Added Displayed Volume, thereby contributing to a deeper and more liquid market to the benefit of all Members. The Exchange also believes that the proposed changes to the required criteria under the Step-Up Additive Rebate reflect a reasonable and equitable allocation of fees and rebates, as the Exchange believes that the additive rebate for qualifying executions of Added Displayed Volume under such tier remains commensurate with the corresponding required criteria under such tier and is reasonably related to the market quality benefits that such tier is designed to achieve, as described above. That is, such additive rebate reasonably reflects the difficulty in achieving the corresponding criteria, as modified.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act¹² in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

¹² 15 U.S.C. 78f(b)(4) and (5).

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow, including liquidity-adding orders, to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹³

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional order flow, including liquidity-adding orders, to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the proposed new alternative criteria under the Step-Up Additive Rebate, and thus receive the additive

¹³ See supra note 11.

rebate for qualifying executions of Added Displayed Volume, would continue to be available to all Members that meet the associated volume requirements in any month. As described above, the Exchange believes that the proposed new required criteria under such tier remain commensurate with the additive rebate provided for qualifying executions of Added Displayed Volume under such tier and are reasonably related to the enhanced liquidity and market quality that such tier is designed to promote. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with

respect to executions of Added Displayed Volume, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to encourage additional order flow, including liquidity-adding orders, to the Exchange through a volume-based tier, which have been widely adopted by exchanges, including the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴ The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. SEC, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or

¹⁴ See supra note 11.

otherwise, in the execution of order flow from broker dealers'".¹⁵ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁶ and Rule 19b-4(f)(2)¹⁷ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

¹⁵ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MEMX-2022-29 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MEMX-2022-29. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.

and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2022-29 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier,
Deputy Secretary.

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¹⁸ 17 CFR 200.30-3(a)(12).